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48816 7590 03/17/2009 IBM CORPORATION - RSW (JVL) C/O VAN LEEUWEN & VAN LEEUWEN P.O. BOX 90609 AUSTIN, TX 78709-0609				
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK E. MOLANDER

Appeal 2008-2589
Application 09/845,537
Technology Center 2100

Decided:¹ March 17, 2009

Before JOHN C. MARTIN, JEAN R. HOMERE, and
THU A. DANG, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals the Examiner's final rejection of claims 1-5, 7-17, and 19-26 under 35 U.S.C. § 134 (2002). Claims 6 and 18 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b)(2002).

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

I. STATEMENT OF THE CASE

A. INVENTION

According to Appellant, the invention relates to providing multiple user-selectable functions from an individual menu item (Spec. 1, II. 4-8).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A method of providing secondary functions from a menu item graphical control, said method comprising:

including a plurality of graphical components with the menu item graphical control, each of the graphical components corresponding to a different programmed function, wherein the menu item graphical control includes a default area in addition to the plurality of graphical components;

displaying the menu item graphical control with the included graphical components and the default area, wherein each of the graphical components are displayed in a position horizontal to the default area;

receiving a selection from a user corresponding to the menu item graphical control;

invoking a default function in response to the selection corresponding to the default area of the menu item graphical control; and

in response to the selection corresponding to one of the graphical components, invoking the programmed function corresponding the selected graphical component.

C. REJECTIONS

The Examiner relies upon the following prior art in rejecting the claims on appeal:

The Google Toolbar reference (herein “the Google Toolbar reference”) consists of annotated, printed web pages (numbered 1-6 by the Examiner) describing the Google ToolbarTM. These web pages were obtained by searching for the term “http://toolbar.google.com” on the Internet Archive WaybackMachine. The search report (herein “WaybackMachine report”) bears the URL http://web.archive.org/web/*/toolbar.google.com and two printed pages, numbered 7 and 8 by the Examiner.

Claims 1-5, 7-17, and 19-26 stand rejected under 35 U.S.C. § 102(a) as being anticipated by the teachings of the Google Toolbar reference.

We affirm.

II. ISSUES

Has Appellant shown that the Examiner erred in finding (1) that the Google Toolbar is a “menu item graphical control” (Claim 1), and thus, the claims are anticipated by the Google Toolbar reference; (2) that the Google Toolbar reference is prior art; and (3) that the declaration under 37 C.F.R. § 1.131 is ineffective to overcome the Google Toolbar reference?

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

The Google Toolbar Reference

1. The Google Toolbar includes “Google Search” to access Google search technology from any web page, “Search Site” (labeled “Element 3” by the Examiner) to search only the pages of the visited site, “PageRank” (labeled “Element 2”) to see Google’s ranking of the current page, “Page Info” to access more information about a page including similar pages, pages that link back to that page, as well as a cached snapshot, “Highlight” to highlight search terms as they appear on the page, and “Word Find” to find search terms wherever they appear on the page (the Google Toolbar reference at 1, bearing URL <http://web.archive.org/web/http://web.archive.org/web/20010202030300/http://toolbar.google.com/>).
2. The Examiner has labeled the portion of the toolbar that contains the name “Google” as “Element 1” (the Google Toolbar reference at 1).
3. The Google Toolbar Drop Down Menu is accessible by clicking on the Google logo within the toolbar to provide different menu functions (the Google Toolbar reference at 5, bearing URL http://web.archive.org/web/20010301204533/tolbar.google.com/menu_help.html).
4. The WaybackMachine search report relied on by the Examiner includes links dated from February 2, 2001, to January 25, 2004, for the search “<http://toolbar.ggoogle.com>” (WaybackMachine report at 7).
5. The Examiner stated that the web pages that comprise the Google Toolbar reference were accessed using “the oldest available link on

the Wayback Machine to access ‘<http://toolbar.google.com/>’ which was 02/02/2001” (Supp. Ans. 2).

IV. PRINCIPLES OF LAW

35 U.S.C. § 102

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citation omitted). “Anticipation of a patent claim requires a finding that the claim at issue ‘reads on’ a prior art reference.” *Atlas Powder Co. v. IRECO, Inc.*, 190 F.3d 1342, 1346 (Fed Cir. 1999) “In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether it also covers subject matter not in the prior art.” *Id.* (citations omitted).

The *claims* measure the invention. *See SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc). “[T]he PTO gives claims their ‘broadest reasonable interpretation.’” *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). “Moreover, limitations are not to be read into the claims from the specification.” *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)).

Electronic publication as prior art

An electronic publication, including an on-line database or Internet publication, is considered to be a “printed publication” within the meaning of 35 U.S.C. § 102(a) and (b) provided the publication was accessible to persons concerned with the art to which the document relates. *See In re Wyer*, 655 F.2d 221, 227 (CCPA 1981) (“Accordingly, whether information is printed, handwritten, or on microfilm or a magnetic disc or tape, etc., the one who wishes to characterize the information, in whatever form it may be, as a ‘printed publication’ * * * should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents” (citations omitted)).

Prior art disclosures on the Internet or on an on-line database are considered to be publicly available as of the date the item was publicly posted. Absent evidence of the date that the disclosure was publicly posted, if the publication itself does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. 102(a) or (b).

MPEP § 2128.

Declaration under 37 C.F.R § 1.131

§ 1.131 Affidavit or declaration of prior invention:

(a) When any claim of an application . . . is rejected, the inventor of the subject matter of the rejected claim . . . may submit an appropriate . . . declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based. . . .

(b) The showing of facts shall be such, in character and weight, as to establish [1] reduction to practice prior to the effective date of the reference, or [2] conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent [actual] reduction to practice or to the filing of the application [i.e., a constructive reduction to practice]. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the . . . declaration or their absence must be satisfactorily explained.

A declaration submitted pursuant to Rule 131 is evaluated on its merits by considering the evidence relied upon in light of the arguments made explaining why the evidence is sufficient. The Board has broad discretion as to the weight to be given the evidence. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1368 (Fed. Cir. 2004); *In re Inland Steel, Co.*, 265 F.3d 1354, 1366 (Fed. Cir. 2001).

V. ANALYSIS

Appellant provides the same arguments with respect to the rejection of claims 1-5, 7-17, and 19-26. Therefore, we select independent claim 1 as being representative of the cited claims. 37 C.F.R. § 41.37(c)(1)(vii).

The Claims are Anticipated by the Google Toolbar Reference

Appellant argues that “[t]he Google Toolbar does not disclose multiple user-selectable functions from an individual menu item” and “[i]n effect, the Google Toolbar becomes another toolbar that can be used from another web page” and “is therefore not a ‘menu item graphical control,’ as

required by the claims” (App. Br. 7). Appellant further notes that, although the drop down menu [shown on the Google Toolbar reference at 5] includes menu items, “[n]one of the menu items shows a ‘menu item graphical control’ containing ‘a plurality of graphical components,’” as required by the claims (*id.*).

However, the Examiner finds that “‘menu item graphical control’ is never specifically defined in the specification” (Ans. 8), and that “a toolbar is considered a menu item graphical control because it controls menu items” wherein “[e]ach of the menu items on the toolbar correspond to a different programmed function (i.e. ‘search site’ and ‘search’); furthermore there is a drop down sub-menu for even more options” (*id.* at 8-9). In particular, the Examiner reads the recited “menu item graphical control” on the Google Toolbar, the recited “default area” on Element 1, and reads the recited plurality of graphical components on Elements 2 and 3 (*id.* at 3). Thus, we determine in this Appeal whether Appellant has shown that the Examiner erred in reading the recited “menu item graphical control” on the Google Toolbar.

We begin our analysis by giving the claims their broadest reasonable interpretation. *See In re Bigio*, 381 F.3d at 1324. Furthermore, our analysis will not read limitations into the claims from the specification. *See In re Van Geuns*, 988 F.2d at 1184.

Appellant’s claim 1 simply does not place any limitation on what the term “menu item graphical control” means, includes or represents. Furthermore, as the Examiner finds, “‘menu item graphical control’ is never

specifically defined in the specification” (Ans. 8). We therefore agree with the Examiner’s finding that “a toolbar is considered a menu item graphical control because it controls menu items” wherein “[e]ach of the menu items on the toolbar correspond to a different programmed function (i.e. ‘search site’ and ‘search’); furthermore there is a drop down sub-menu for even more options” (*id.* at 8-9). Thus, we will not narrowly construe “menu item graphical control” to mean a “menu item,” as the Appellant contends.

The Google Toolbar reference includes a toolbar which includes graphical components such as “Google Search,” “Search Site,” and “PageRank” which correspond to functions such as searching or ranking (FF 1-2), wherein Google Toolbar Drop Down Menu is accessible by clicking on the Google logo within the toolbar to provide different menu functions (FF 3).

We find an artisan would have understood the Google Toolbar of the Google Toolbar reference to be a “menu item graphical control” (Claim 1) which comprises a plurality of graphical components such as “Google Search,” “Search Site,” and “PageRank.”

Accordingly, we conclude that the Appellant has not shown that the Examiner erred in finding that the Google Toolbar described in the Google Toolbar reference includes all of the limitations recited in claim 1.

Google Toolbar is Prior art

In the Reply Brief, Appellant adds the argument that “there is absolutely no publication date on the Google reference whatsoever” and

that, “because a publication date does not appear on the Google Toolbar reference, the earliest date that can be relied upon by the Examiner is October 24, 2004 (the retrieval date of the reference)” after the filing date of the application (Reply Br. 3). However, the Examiner responds that “[t]he date of the reference is imbedded within the URL (i.e. 20010202...)” (Supp. Ans. 3) and that “[t]he Examiner used the oldest available link on the WaybackMachine to access ‘http://toolbar.google.com/’ which was 02/02/2001” (*id.* at 2). Thus, we determine on this Appeal whether Appellant has shown that the Examiner erred in finding that the Google Toolbar reference was published prior to Appellant’s application filing on April 30, 2001.

We generally agree with the Examiner’s finding that the Google Toolbar reference is prior art beginning at page 2 of the Supplemental Answer.

As noted above, the Examiner finds that the content relied upon in Google Toolbar was available on a website as early as February 2, 2001, as set forth by the URL of the website as well as the cached link listed on the internet archive website, as determined by the WaybackMachine (Supp. Ans. 2, FF 4-5). Because the number sequence “20010202” in the URL that appears at the top of page 1 of Google Toolbar is consistent with the Examiner’s assertion that page was obtained by using the February 2, 2001 WaybackMachine link, this evidence *prima facie* establishes that page 1 was publicly available on that date.

However, we also note that the URLs at the tops of pages 2-6 do not contain that same date sequence. Instead, the URLs on pages 2-4 contain the sequence “20010208” (February 8, 2001) and the URLs on pages 5-6 contain the sequence “20010301” (March 1, 2001). Although the Examiner apparently inadvertently erred in indicating that these pages were publicly available on February 2, 2001, their dates still precede Appellant’s April 30, 2001, filing date.²

Though Appellant contends that “there is absolutely no publication date on the Google reference whatsoever” (Reply Br. 3), Google Toolbar is considered to be a “printed publication” within the meaning of 35 U.S.C. § 102(a) and (b) since it was accessible on-line prior to April 30, 2001. *See In re Wyer*, 655 F.2d at 227. That is, though Appellant quotes MPEP § 2128 in relevant part as follows: “If the publication does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. 102(a) or (b), although it may be relied upon to provide evidence regarding the state of the art” (Reply Br. 4, bolding and italics omitted), that language appeared in previous versions of § 2128 and has been replaced with the following language: “>Absent evidence of the date that the disclosure was publicly posted, if< the publication >itself< does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C.

² It is apparent from the URLs that pages 2-4 were retrieved by using WaybackMachine.com to search for “toolbar.google.com/button_help.html” and that pages 5-6 were retrieved using a search for “toolbar.google.com/menu_help.html,” which we have confirmed. We attach those search reports hereto.

102(a) or (b)*>. However<, it may be relied upon to provide evidence regarding the state of the art” (MPEP § 2128, 8th ed, rev. 7, July 2008).

As set forth by MPEP § 2128, prior art disclosures on the Internet are considered to be publicly available as of the date the item was publicly posted, which, in this case, includes the dates of February 2, 2001, February 8, 2001, and March 1, 2001.

Appellant’s argument that the Examiner’s reliance on the URLs and the WaybackMachine report is improper because the dates therein are hearsay (Suppl. Reply Br. 2) is also unconvincing. *See In re Epstein*, 32 F.3d 1559, 1565 (Fed. Cir. 1994) (“The inapplicability of hearsay evidence rules in *ex parte* PTO examination is appropriate in light of the purpose and reason for the hearsay rule”).

Consequently, the Appellant has not met his burden of proving that the Examiner erred in relying on Google Toolbar as a reference or in finding that Google Toolbar is an anticipatory reference under 35 U.S.C. § 102(e).

*The Declaration under 37C.F.R. 1.131 is Ineffective
to overcome Google Toolbar*

The Examiner also finds that the declaration under 37 C.F.R. § 1.131 “is ineffective to overcome the Google Toolbar reference” (Ans. 9). Thus, we also determine on this Appeal whether the declaration under 37 C.F.R. § 1.131 is ineffective to overcome Google Toolbar.

We generally agree with the Examiner’s findings in the Answer starting with page 9 of the Answer. We agree with the Examiner that the

declaration is on its face legally insufficient. In particular, we find that the declaration fails to address each claim element and explain why the declaration and accompanying Exhibit A prove the alleged conception and diligence. Instead, the declaration (in paragraph 2) states, without elaboration, only the following regarding conception and diligence:

2. Prior to February 2, 2001, I conceived of, in the United States of America, the invention described and claimed in the subject application. I further showed diligence from the date of conception to the filing date of the subject application. Conception and diligence to filing is evidenced by the following:
 - a) I submitted IBM Invention disclosure Form RSW8-2000-0109, attached as Exhibit A hereto, which describes the invention described and claimed in the subject application.
 - b) Each of the dates deleted from Exhibit A is prior to February 2, 2001.
 - c) I worked diligently with a patent attorney in order to file the subject application on April 30, 2001.

As to conception, the declaration does not explain how Exhibit A, which is an Invention Disclosure Form, proves conception of each claim limitation. Consequently, the facts recited in the declaration are insufficient to establish conception of any of the individual elements of the instant claims before the date of the reference.

As to diligence, the declaration does not identify acts demonstrating that diligence began before the reference date and continued to Appellant's April 30, 2001, filing date, as required to satisfy 37 C.F.R. § 1.131(b). Consequently, the declaration and accompanying argument are insufficient to establish the requisite diligence.

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Appellant has therefor failed to show that the Examiner erred in holding that the declaration under 37 C.F.R. § 1.131 is ineffective to overcome Google Toolbar.

CONCLUSIONS

(1) Appellant has not shown that the Examiner erred in finding that claims 1-5, 7-17, and 19-26 are anticipated by the teachings of Google Toolbar.

(2) Claims 1-5, 7-17, and 19-26 are not patentable.

DECISION

We affirm the Examiner's decision rejecting claims 1-5, 7-17, and 19-26 under 35 U.S.C. § 102(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

msc

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Enter Web Address	<input type="text" value="http://"/>	All	Take Me Back	Advanced Search
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Searched for http://toolbar.google.com/button_help.html

376 Results

Note some duplicates are not shown. [See all](#).

* denotes when site was updated.

Material typically becomes available here 6 months after collection. [See FAQ](#).

Search Results for Jan 01, 1996 - Sep 17, 2008

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
0	0	0	0	0	20	10	6	117	98
pages	pages	pages	pages	pages	pages	pages	pages	pages	pages
					Feb 08, 2001 *	Feb 03, 2002	Feb 01, 2003 *	Apr 08, 2004 *	Jan 03, 2005
					Mar 31, 2001 *	Jun 05, 2002 *	Apr 01, 2003 *	Jun 11, 2004	Jan 08, 2005
					Apr 11, 2001	Aug 02, 2002	Jun 09, 2003	Jun 12, 2004	Jan 10, 2005
					Jun 12, 2001	Oct 01, 2002	Aug 01, 2003 *	Jun 13, 2004	Jan 11, 2005
					Aug 01, 2001	Nov 04, 2002	Oct 02, 2003 *	Jun 15, 2004	Jan 13, 2005
					Oct 06, 2001 *	Nov 15, 2002	Dec 06, 2003 *	Jun 16, 2004	Jan 14, 2005
					Oct 09, 2001	Nov 18, 2002		Jun 18, 2004	Jan 20, 2005
					Nov 04, 2001 *	Nov 25, 2002 *		Jun 19, 2004	Jan 21, 2005
					Nov 05, 2001	Dec 01, 2002		Jun 22, 2004	Jan 31, 2005
					Nov 07, 2001	Dec 02, 2002		Jun 23, 2004	Feb 04, 2005
					Nov 10, 2001			Jun 24, 2004	Feb 05, 2005
					Nov 12, 2001			Jun 25, 2004	Feb 06, 2005
					Nov 16, 2001			Jun 26, 2004	Feb 09, 2005
					Nov 17, 2001			Jun 27, 2004	Feb 12, 2005
					Nov 20, 2001			Jun 28, 2004	Feb 14, 2005
					Nov 24, 2001			Jun 29, 2004	Feb 15, 2005
					Nov 25, 2001			Jun 30, 2004	Feb 17, 2005
					Nov 27, 2001			Jul 01, 2004	Feb 18, 2005
					Nov 29, 2001			Jul 03, 2004	Feb 20, 2005
					Dec 14, 2001			Jul 04, 2004	Feb 21, 2005
								Jul 05, 2004	Mar 02, 2005
								Jul 06, 2004	Mar 03, 2005
								Jul 07, 2004	Mar 04, 2005
								Jul 08, 2004	Mar 10, 2005
								Jul 10, 2004	Mar 11, 2005

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<u>Jul 11, 2004</u>	<u>Mar 16, 2005</u>
<u>Jul 12, 2004</u>	<u>Mar 24, 2005</u>
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<u>Jul 22, 2004</u>	<u>Apr 19, 2005</u>
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<u>Jul 24, 2004</u>	<u>Apr 24, 2005</u>
<u>Jul 25, 2004</u>	<u>Apr 28, 2005</u>
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<u>Aug 04, 2004</u>	<u>May 16, 2005</u>
<u>Aug 05, 2004</u>	<u>May 19, 2005</u>
<u>Aug 06, 2004</u>	<u>May 26, 2005</u>
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<u>Aug 21, 2004</u>	<u>Jul 10, 2005</u>
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<u>Aug 28, 2004</u>	<u>Aug 11, 2005</u>
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<u>Aug 31, 2004</u>	<u>Aug 17, 2005</u>
<u>Sep 02, 2004</u>	<u>Aug 19, 2005</u>
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<u>Sep 12, 2004</u>	<u>Sep 20, 2005</u>
<u>Sep 13, 2004</u>	<u>Sep 23, 2005</u>

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<u>Sep 14, 2004</u>	<u>Sep 29, 2005</u>
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<u>Sep 16, 2004</u>	<u>Oct 01, 2005</u>
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<u>Sep 24, 2004</u>	<u>Oct 30, 2005</u>
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<u>Oct 01, 2004</u>	<u>Nov 05, 2005</u>
<u>Oct 09, 2004</u>	<u>Nov 06, 2005</u>
<u>Oct 12, 2004</u>	<u>Nov 24, 2005</u>
<u>Oct 14, 2004</u>	<u>Nov 25, 2005</u>
<u>Oct 15, 2004</u>	<u>Nov 26, 2005</u>
<u>Oct 16, 2004</u>	<u>Nov 27, 2005</u>
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<u>Dec 13, 2004</u>	
<u>Dec 18, 2004</u>	
<u>Dec 30, 2004</u>	

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Enter Web Address: All Take Me Back Advanced Search Compare Archives Pages

Searched for http://toolbar.google.com/menu_help.html

174 Results

Note some duplicates are not shown. [See all](#).

* denotes when site was updated.

Material typically becomes available here 6 months after collection. [See FAQ](#).

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1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
0	0	0	0	0	16	8	5	99	6
pages	pages	pages	pages	pages	pages	pages	pages	pages	pages
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